



October 15, 2002

Ms. Lisa B. Silvia
Paralegal
Fort Worth Independent School District
100 North University Drive
Fort Worth, Texas 76107

OR2002-5852

Dear Ms. Silvia:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 170763.

The Fort Worth Independent School District (the "district") received a request for information "relating to business between the [district] and the firm of Whitley Penn and Associates . . . during the period January 1, 2001 and the date of this letter[.]" You indicate that the district has released some of the requested information. You claim, however, that other responsive information is excepted from disclosure under sections 552.101, 552.107, 552.111, and 552.116 of the Government Code and under the Texas Rules of Evidence. We have considered the exceptions you claim and reviewed the submitted representative sample of information.¹

Initially, we note that some of the submitted documents are subject to section 552.022 of the Government Code. Section 552.022 makes certain information public, unless it is expressly confidential under other law. One category of public information under section 552.022 is information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body. *See* Gov't Code § 552.022(a)(3). Sections 552.107, 552.111, and 552.116 are discretionary exceptions under the Public Information Act

¹We assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

(the “Act”) and do not constitute “other law” for purposes of section 552.022.² Therefore, the submitted documents that are subject to section 552.022(a)(3), which we have marked, may not be withheld under sections 552.107, 552.111, or 552.116.

Although section 552.107(1) does not protect information that is subject to disclosure under section 552.022, the attorney-client privilege is also found in Rule 503 of the Texas Rules of Evidence. Recently, the Texas Supreme Court held that “[t]he Texas Rules of Civil Procedure and Texas Rules of Evidence are ‘other law’ within the meaning of section 552.022.” *In re City of Georgetown*, 53 S.W.3d 328 (Tex. 2001). Thus, we will determine whether the information that is subject to section 552.022(a)(3) is confidential under Rule 503.

Rule 503(b)(1) provides:

A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client:

- (A) between the client or a representative of the client and the client’s lawyer or a representative of the lawyer;
- (B) between the lawyer and the lawyer’s representative;
- (C) by the client or a representative of the client, or the client’s lawyer or a representative of the lawyer, to a lawyer or a representative of a lawyer representing another party in a pending action and concerning a matter of common interest therein;
- (D) between representatives of the client or between the client and a representative of the client; or
- (E) among lawyers and their representatives representing the same client.

²Discretionary exceptions are intended to protect only the interests of the governmental body, as distinct from exceptions which are intended to protect information deemed confidential by law or the interests of third parties. *See, e.g.*, Open Records Decision Nos. 630 at 4 (1994) (governmental body may waive attorney-client privilege, section 552.107(1)), 592 at 8 (1991) (governmental body may waive section 552.104, information relating to competition or bidding), 549 at 6 (1990). Discretionary exceptions therefore do not constitute “other law” that makes information confidential.

Tex. R. Evid. 503(b)(1). A communication is “confidential” if not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication. *See* Tex. R. Evid. 503(a)(5).

Accordingly, in order to withhold attorney-client privileged information from disclosure under Rule 503, a governmental body must 1) show that the document is a communication transmitted between privileged parties or reveals a confidential communication; 2) identify the parties involved in the communication; and 3) show that the communication is confidential by explaining that it was not intended to be disclosed to third persons and that it was made in furtherance of the rendition of professional legal services to the client. Upon a demonstration of all three factors, the document containing privileged information is confidential under Rule 503, provided the client has not waived the privilege or the document does not fall within the purview of the exceptions to the privilege enumerated in Rule 503(d). *See Pittsburgh Corning Corp. v. Caldwell*, 861 S.W.2d 423, 427 (Tex. App.—Houston [14th Dist.] 1993, no writ); *see also* Tex. R. Evid. 511 (waiver of privilege by voluntary disclosure).

After reviewing your arguments and the documents submitted to this office, we believe that you have demonstrated that the documents subject to section 552.022(a)(3) constitute confidential communications made for the purpose of facilitating the rendition of professional legal services to the client. Thus, these documents, which we have marked, may be withheld under Rule 503 of the Texas Rules of Evidence.

We will now address your arguments against disclosure with respect to the remaining submitted information. Section 552.101 of the Government Code excepts from public disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” You have not directed our attention to any law, nor are we aware of any law, under which any of the information in question is considered to be confidential for purposes of section 552.101. *See, e.g.,* Open Records Decision Nos. 600 at 4 (1992) (constitutional privacy), 478 at 2 (1987) (statutory confidentiality), 611 at 1 (1992) (common-law privacy). Therefore, none of the remaining information is excepted from disclosure under section 552.101 of the Government Code.

Section 552.116 of the Government Code provides as follows:

- (a) An audit working paper of an audit of the state auditor or the auditor of a state agency or institution of higher education as defined by Section 61.003, Education Code, is excepted from [required public disclosure]. If information in an audit working paper is also maintained in another record, that other record is not excepted from [required public disclosure] by this section.

(b) In this section:

(1) 'Audit' means an audit authorized or required by a statute of this state or the United States and includes an investigation.

(2) 'Audit working paper' includes all information, documentary or otherwise, prepared or maintained in conducting an audit or preparing an audit report, including:

(A) intra-agency and interagency communications; and

(B) drafts of the audit report or portions of those drafts.

You have not demonstrated that the requested information was prepared or maintained by the state auditor or the auditor of a state agency or institution of higher education in conducting an audit authorized or required by a statute of this state or the United States. *See* Gov't Code §§ 552.116(a), (b)(1), (b)(2). Therefore, the remaining information is not excepted under section 552.116 and must be released.

You also argue that the submitted documents contain attorney work product that is excepted from disclosure. We note that the appropriate exception to claim with respect to attorney work product is section 552.111 of the Government Code. A governmental body may withhold attorney work product from disclosure under section 552.111 if it demonstrates that the material was (1) created for trial or in anticipation of civil litigation, and (2) consists of or tends to reveal an attorney's mental processes, conclusions, and legal theories. Open Records Decision No. 647 (1996). As you have not made arguments relevant to either prong of the work product test, we cannot conclude that any portion of the remaining documents is protected by section 552.111 and the work product privilege.

You also claim that the submitted information is generally excepted under the Texas Rules of Evidence. As noted above, we acknowledge that the Texas Supreme Court recently held that "[t]he Texas Rules of Civil Procedure and Texas Rules of Evidence are 'other law' within the meaning of section 552.022." *In re City of Georgetown*, 53 S.W.3d 328 (Tex. 2001). The remaining documents, however, do not fall into the categories of information in section 552.022. Because the remaining documents do not fall into a section 552.022 category, we conclude that the remaining information may not be withheld on the basis of any provision of the Texas Rules of Evidence.

Section 552.107(1) of the Government Code protects information coming within the attorney-client privilege. In instances where an attorney represents a governmental entity, the attorney-client privilege protects only an attorney's legal advice and the client's confidences made to the attorney. *See* Open Records Decision No. 574 (1990). Accordingly,

these two classes of information are the only information contained in the records at issue that may be withheld pursuant to the attorney-client privilege. Upon review of the submitted information, we conclude that some of the submitted documents contain or constitute client confidences that come within the attorney-client privilege and are therefore excepted from disclosure under section 552.107(1). Thus, we have marked the remaining documents that may be withheld under section 552.107(1).

Finally, we note that some of the submitted information must be withheld under section 552.137 of the Government Code. Section 552.137 requires the district to withhold an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body, unless the member of the public has affirmatively consented to its release. You do not inform us that a member of the public has affirmatively consented to the release of any e-mail address contained in the submitted materials. The district must, therefore, withhold e-mail addresses of members of the public under section 552.137. Thus, we have marked the e-mail addresses in the remaining documents that must be withheld under section 552.137.

To summarize: (1) we have marked the submitted documents that are subject to section 552.022(a)(3) of the Government Code and may be withheld under Rule 503 of the Texas Rules of Evidence; (2) we have marked the documents that may be withheld under section 552.107(1) of the Government Code; and (3) we have marked the e-mail addresses that must be withheld under section 552.137 of the Government Code. The remaining information must be released to the requestor.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records

will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Karen A. Eckerle
Assistant Attorney General
Open Records Division

KAE/sdk

Ref: ID# 170763

Enc: Submitted documents

c: Mr. John W. Sweeney, Jr.
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(w/o enclosures)